UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF COMMERCE, et al., Defendants.	18-CV-2921 (JMF)

NEW YORK IMMIGRATION COALITION, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF COMMERCE, et al., Defendants.	18-CV-5025 (JMF) (Consolidated Case)

OPPOSITION TO DEFENDANTS' MOTION IN LIMINE

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Defendants' Motion In Limine, Docket No. 408, is in the main an attack on the Court's July 3 (and subsequent) decision(s) to allow extra-record evidence combined with an untimely and ill-conceived motion to exclude one of Plaintiffs' witnesses. For the reasons set forth in greater detail below, Plaintiffs respond to Defendants' Motion as follows: (1) Plaintiffs agree that the *full* Administrative Record should be admitted in evidence but note that there is a dispute over what constitutes the Administrative Record; (2) Defendants' motion to exclude all testimony and exhibits beyond the Administrative Record should be denied; and (3) Defendants' untimely and ill-conceived motion to exclude Plaintiffs' expert Dr. Lisa Handley should be denied.[1]

I. THE FULL ADMINISTRATIVE RECORD SHOULD BE ADMITTED

The parties agree that the administrative record should be admitted in evidence. But the parties dispute the scope of that administrative record. Defendants appear to take the outlandish position that only the first 1321 pages produced by Defendants constitute the record. *See* Docket No. 419–1 at n.1 (explaining that subsequent materials produced were "a broader set of materials than would normally be considered appropriate for an administrative record"). This is not the law. Under the APA, judicial review is required to be conducted based on the "whole record." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1977). Agencies are required to submit the "whole record" including all of the materials before the agency, not merely a subset actually considered by a decision-maker, and not merely the subset that purportedly support the ultimate decision. *See Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir.

[1] With regard to Plaintiffs' motions in limine (Dkt. No. 411 & 413), consistent with this Court's Individual Rule and Practice 2.D, if the court permits oral argument, Plaintiffs would intend to have junior attorneys on the team argue these motions, and would request that argument be heard on November 5. Plaintiffs believe the Defendants' motions can be resolved at that time, with the exception of the motion concerning Dr. Handley—Plaintiffs request that motion be resolved at or before the October 31 pre-trial conference.

1984) ("To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case."). And where subordinates conducted "work and [made] recommendations of subordinates, those materials should be included as well." *Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*,143 F. Supp. 2d 7, 12 (D.D.C. 2001) (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)).

Defendants' original record omitted vast swaths of documents before the agency, including materials created during the many months that the Secretary sought to add the citizenship question prior to receiving the DOJ's formal request. *See* Tr. of Oral Argument at 79–82 (July 3, 2018) (finding it "inconceivable . . . that there aren't additional documents from earlier in 2017" in the record). Moreover, Defendants' originally produced, incomplete record was "nearly devoid of materials from key personnel," including the subordinates upon whom the Secretary directly or indirectly relied. *Id.* at 81–2. It was precisely because of such omissions that the Court ordered that "by July 23, 2018, Defendants shall produce the complete record . . . ." July 5 Order, Docket No. 199; July 3 Tr. at 82 ("plaintiffs' request for an order directing defendants to complete the Administrative Record is well founded.").

Pursuant to that Order, the Defendants made two subsequent productions on July 23 and (with a Court-authorized extension) July 26. In addition to these supplements to the Administrative Record, Defendants have also produced materials that they designated as extra-record discovery, which were all labelled with the Bates-prefix "COM_DIS."

Notwithstanding this course of conduct and the Court's Order, Defendants now apparently take the view that the "whole record" should not include the Secretary's May 2, 2017 exchange with Earl Comstock in which the Secretary asked "why nothing have been done in response to my months old request that we include the citizenship question," to which Comstock replied,

"[o]n the citizenship question we will get that in place," and "we need to work with Justice to get them to request that the citizenship be added back as a census question." A1 [PX-088 (AR 0003710)]. Similarly, Defendants would exclude Comstock's September 8, 2017 email to the Secretary reporting his unsuccessful efforts to recruit DOJ and DHS to ask the citizenship question, and having failed on that score, that he was investigating "how Commerce could add the question to the Census itself." A2 [PX-537 (AR 0012756)]. For the reasons stated in the Court's July 3, 2018 Order, the materials that Defendants produced to complete the administrative record—principally, AR 001322–0013099 (as well as subsequently produced unredacted versions of these documents produced pursuant to motions to compel)—are properly considered the complete administrative record.

Presenting a *complete* administrative record is necessary to permit the Court's effective judicial review under 5 U.S.C. § 706; anything less would permit Defendants to "skew the 'record' for review in [their] favor by excluding from that 'record' information in [their] own files which has great pertinence to the proceeding in question." *Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978); *see also Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1538 (9th Cir. 1998) ("An incomplete record must be viewed as a 'fictional account of the actual decisionmaking process.'") (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977)).

In addition to the records noted above, Defendants designated various other documents in and after their October 16 productions that should be part of the Administrative Record as extra-record materials. Some of the materials designated as extra-record discovery involve the same issues and are part of the same email chains as portions of the Administrative Record.

For example, Defendants have designated certain of the Commerce Department's interactions with Mark Neuman about the citizenship question as extra-record discovery, while treating others as Administrative Record. *Compare* A3-1 [PX-185 (COM_DIS00016561), PX-186 (COM_DIS00018614), PX-188 (COM_DIS00018615)] *with* A3-2 [PX-087 (AR 003709), PX-083 (AR 003699), PX-145 (AR 0011329), PX-052 (AR 002482)]. Defendants have similarly designated certain of the communications surrounding James Uthmeier's August 11 memo as extra-record discovery, while treating others as Administrative Record. *Compare* A4-1 [COM_DIS00017126, COM_DIS00017127] *with* A4-2 [PX-050 (AR 002461), AR 0011312, AR 0011332, AR 0011343]. And Defendants have designated certain interactions between the Commerce Department and the White House about the citizenship question as extra-record discovery, while designating others as part of the Administrative Record. *Compare* A5-1 [COM_DIS00015698] *with* A5-2 [PX-058 (AR 2561), PX-019 (AR 000763)]. In addition, per the Court's guidance at the October 24 hearing regarding a procedure for agreed-upon additions to the Administrative Record (Oct. 24 Tr. at 24–30), Plaintiffs requested on October 30 that Defendants agree to add certain exhibits to the Administrative Record. *See* A6. If the parties are unable to agree, Plaintiffs will move to supplement the Administrative Record to include these exhibits (reserving the right to identify additional materials for Defendants and, if necessary, the Court, for inclusion in the "whole record" for review as properly considered).

II. THE MOTION TO EXCLUDE EXTRA-RECORD EVIDENCE AS TO THE MERITS SHOULD BE DENIED

Defendants' argument that extra-record evidence should be excluded as irrelevant under FRE 402 is both wrong and directly contrary to the Court's October 26 order, Docket No. 405. Defendants had asked for a stay pending Supreme Court review of, *inter alia,* the trial on grounds that as to the merits of the case, the adjudication should be confined to the

Administrative Record. *See* Dkt. No. 397. In denying Defendants' requested stay, the Court made clear that it would hear extra-record evidence. To be sure, the Court expressly stated that Defendants "remain free to argue at trial that the Court should disregard all evidence outside the administrative record, " Dkt. No. 405 at 3, but it made plain that is an issue to be resolved at the end of the trial and not before it starts. The Court expressly directed the "the parties to differentiate in their pre- and post-trial briefing between arguments based solely on the administrative record and arguments based on materials outside the record. The Court anticipates differentiating along similar lines in any findings of fact and conclusions of law that it enters." *Id.* (citing Oct. 24th Tr. 16). The Court also proceeded to reaffirm its July 5, 2018 Order, Dkt. No. 199, authorizing extra-record evidence. October 26 Order at 9 ("Finally, the Court's decision to authorize extra-record discovery was, and remains, well founded.").

In short, while Defendants have preserved their argument that in the end the Court should look only to the administrative record in making its decision, the Court has made clear that the best and most efficient way to proceed now is to allow both the administrative record and extra-record evidence to be admitted and for the Court to decide at the conclusion of trial the proper evidentiary basis for its decision.

Finally, much of the contested evidence, while not in the Administrative Record, is relevant to issues where courts frequently consider extra-record discovery in Administrative Procedure Act cases. These include issues of standing, where Dr. Hillygus' testimony is directly relevant because it concerns the expected impact of the citizenship question on self-response and undercount of certain populations. This evidence also includes expert testimony about technical Census issues, including whether the Census Bureau followed its well-established procedures for changing the content to the Decennial Census questionnaire—about which both Dr. Habermann

and Mr. Thompson will testify. *E.g.*, *City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906, 917 (E.D.N.Y. 1993); *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1093 (S.D.N.Y. 1987); *New York v. Salazar*, 701 F. Supp. 2d 224, 241 (N.D.N.Y. 2010) ("deviated from its customary practices and procedures"); *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 231-34 (E.D.N.Y. 2006) (officials "needed to find acceptable rationales" and the "agency deviated from its traditional practices"). And it includes fact and expert testimony relevant to Administrative Procedure Act questions where extra-record discovery is permitted, including (i) whether the agency failed to consider an important aspect of the problem (Dr. Hillygus, Dr. Abowd, Dr. Jarmin), and (ii) whether the stated reason for the question is the actual reason or a pretext because the Department of Justice has no need for block level citizenship data and the Census Bureau is barred from publishing such data (Dr. Handley, Dr. Habermann, Mr. Comstock, Ms. Dunn Kelley and Ms. Teramoto). *See Tummino v. Torti*, 603 F. Supp. 2d 519, 543-34 (E.D.N.Y. 2009); *Tummino*, 427 F. Supp. 2d at 231-34; *Buffalo Cent. Terminal v. United States*, 886 F. Supp. 1031, 1045-46 (W.D.N.Y. 1995).

III. THE COURT SHOULD DENY DEFENDANTS' LATE MOTION TO DISQUALIFY DR. HANDLEY BECAUSE THE DISQUALIFICATION STANDARD DOES NOT APPLY HERE, AND IF IT DID, DEFENDANTS COULD NOT SATISFY IT

Disqualifying an expert "is a drastic remedy, . . . resorted to rarely." *Eastman Kodak Co. v. Kyocera Corp.*, 10-CV-6334CJS, 2012 WL 4103811, at *7 (W.D.N.Y. Sept. 17, 2012); *see also Koch Refining Co. v. Jennifer L. Boudreau M/V*, 85 F.3d 1178, 1181 (5th Cir. 1996) ("cases that grant disqualification are rare"); *Grioli v. Delta Intern. Mach. Corp.*, 395 F. Supp. 2d 11, 13 (E.D.N.Y. 2005) (same). Yet Defendants heighten the already-extreme nature of their request having laid in wait and springing it on the eve of trial. This timing smacks of gamesmanship and the type of "trial by ambush" courts routinely reject. *Novomoskovsk Jt. Stock Co. "Azot" v. Revson*, 95 CIV. 5399 (JSR), 1998 WL 804712, at *1 (S.D.N.Y. Nov. 12, 1998). Despite

Plaintiffs disclosing Dr. Handley as an expert almost two months ago, Defendants did not inform Plaintiffs or the Court of their position until this motion or even depose Dr. Handley to determine whether she in fact relied on any confidential information (knowing she had not). Instead, they filed this motion a week before trial, also failing to comply with section 3.I of this Court's Individual Rules of Practice in Civil Cases for "motions to exclude testimony of experts" to be filed "by the deadline for dispositive motions" and not as "as motions *in limine*."

Even if the Court considers the merits of their untimely argument, it fails on several grounds. First, the standard urged by Defendants does not apply in situations where, like here, the entity that previously retained the expert is a distinct entity from the current adverse party. Second, even applying that standard, Defendants have not shown that Dr. Handley received the type of confidential information this standard seeks to protect, or that Defendants would be harmed by not cross-examining her about such confidential information. Third, the equities and public interest support allowing Dr. Handley to testify, particularly given the late hour of Defendants' motion.

For all these reasons, the Court should deny Defendants' motion. In the alternative, if the court were to grant Defendant's motion, it should still permit Dr. Handley to testify while precluding only those portions of her testimony describing the details of her analyses in particular cases while serving as an expert for DOJ, *see* Defs.' Br. at 9-10 (describing Dr. Handley's analyses in the *Eastpointe*, *Texas*, and *Perez* cases), and also grant Plaintiffs leave to identify and retain a new expert witness on the same topics before the close of evidence.

A. The Standard for Expert Exclusion Does Not Apply Here, Because Dr. Handley Did Not Provide Prior Services to These Defendants.

The standard for expert exclusion on grounds of conflict does not even apply here, because neither the Commerce Department nor the Census Bureau nor Secretary Ross nor Dr.

Jarmin—the only Defendants here—has ever retained Dr. Handley for any purpose. The standard cited by Defendants for expert qualification asks if all of the following elements are present when considering "the issue of an expert who formerly had a relationship with an adverse party . . . . : (1) was it objectively reasonable for the first party who retained the expert to conclude that a confidential relationship existed; (2) was any confidential or privileged information disclosed by the first party to the expert; and (3) does the public have an interest in allowing or not allowing the expert to testify." *Grioli*, 395 F. Supp. 2d at 13–14. The standard itself reveals the first weakness of Defendants' argument: Dr. Handley never "had a relationship with an adverse party," and thus the first prong of a confidential relationship with "the first party who retained the expert" does not come into play. Not a single case cited by Defendants involves a situation where the presently adverse party and the party with whom the expert had a prior formal relationship were distinct; all involve identical parties.[2]

Here, as Mr. Mellett's declaration states, "the Department [of Justice] has hired Dr. Lisa Handley as its external expert," and she testified on behalf of the United States in those cases. Dkt. No. 408–5 ¶ 3. Unlike all the cases cited by Defendants and the standard they propose, neither the Department of Justice ("DOJ") nor the United States are parties here,[3] and

[2] *See id.* at 14 (expert previously represented defendant as an attorney); *Koch Refining*, 85 F.3d at 1181 (party that retained expert switched sides in litigation); *In re Namenda Direct Purchaser Antitrust Litig.,* 15 CIV. 7488 (CM), 2017 WL 3613663, at *1 (S.D.N.Y. Aug. 21, 2017) (plaintiffs' expert was a former executive for the defendant); *Auto-Kaps, LLC v. Clorox Co.*, 15 CIV. 1737 (BMC), 2016 WL 1122037, at *3 (E.D.N.Y. Mar. 22, 2016) (plaintiff's expert consulted with defendant for approximately two years); *Hinterberger v. Catholic Health System, Inc.*, 08-CV-380S F, 2013 WL 2250591, at *7 (W.D.N.Y. May 21, 2013) (company retained as expert by defendants previously provided services to plaintiffs in connection with litigation); *Gordon v. Kaleida Health*, 08-CV-378S F, 2013 WL 2250506, at *6 (W.D.N.Y. May 21, 2013) (same); *Eastman Kodak Co.*, 2012 WL 4103811, at *6 (defendants' expert was previously plaintiffs' expert in another case); *Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588, 590 (D. Minn. 1986) (defendants' expert was a "consulting engineer with plaintiff").

[3] It is a particularly noteworthy overreach to seek to disqualify Dr. Handley on this basis where the Defendants vigorously—and successfully—opposed the *NYIC* Plaintiffs' motion to amend the complaint to add DOJ as a defendant. *See N.Y. Immigration Coal. v. U.S. Dep't of Commerce*, 18-cv-5025 (JMF), 2018 WL 4292673 (S.D.N.Y. Sept. 7, 2018) (order denying leave to amend complaint).

Defendants do not contend that Dr. Handley ever consulted for the Commerce Department, Census Bureau, Secretary Ross or Dr. Jarmin. To the extent that Defendants blur this distinction by arguing that they are coextensive with the United States as a party, Plaintiffs could have sued the United States as allowed by 5 U.S.C. § 702, but they did not. Where the APA itself makes a distinction between federal agencies and the United States as defendants, it is nonsensical to argue that the Commerce Department, Justice Department and United States are effectively coextensive.[4]

Disqualifying an expert who a non-party previously retained would also run counter to the rule's limited purpose. Typically, disqualification is appropriate "where a party seeks to retain as an expert an adversary's former employee who learned confidential information during the course of his employment, or where an expert switches sides during the course of litigation." *Eastman Kodak Co.*, 2012 WL 4103811, at *7. Allowing one federal agency to disqualify an adverse expert because they have previously been retained by another federal agency would turn a rule that is "a drastic remedy," *id.*, into everyday practice.

B. Defendants Have Not Shown Dr. Handley Received Confidential Information the Rule Protects Against and Their Cross-Examination Argument Rings Hollow

Unlike "attorney-client communications, discussions between parties or counsel and experts do not carry the presumption that confidential information was exchanged." *Stencel v. Fairchild Corp.*, 174 F. Supp. 2d 1080, 1083 (C.D. Cal. 2001). Thus, the "burden is on the party seeking to disqualify the expert" to cite "specific and unambiguous disclosures that if revealed

[4] Just last year, DOJ even filed an amicus brief in the Second Circuit on behalf of the United States that knowingly took a directly adverse position to another federal agency, the Equal Opportunity Employment Commission (EEOC). *Compare* En Banc Br. of Amicus Curiae E.E.O.C in Support of Plaintiffs/Appellants and in Favor of Reversal, Dkt. No. 296, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. June 23, 2017), *with* Br. for the United States as Amicus Curiae at 1, Dkt. No. 417, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. July 26, 2017) (advocating for the opposite position and stating that "the EEOC is not speaking for the United States and its position about the scope of Title VII").

would prejudice the party." *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1094 (N.D. Cal. 2004); *see also Eastman Kodak*, 2012 WL 4103811, at *8. Defendants have not met this burden.

For one, Defendants cite confidentiality agreements, but never argue that Dr. Handley violated their provisions, which expressly allow use of "materials which are matters of public record." Dkt. No. 408–5 at 15, 19, 23. Indeed, Dr. Handley's report relies generally on her experience as an expert for several decades and publicly-available documents to demonstrate general principles of Voting Rights Act (VRA) analysis, but she offers no opinions about specific cases in which she was retained by DOJ, or details about those cases beyond what is contained in her publicly-available reports. *See* Decl. of Lisa Handley (attached at A7).[5] Defendants cannot show prejudice from her discussion of these public reports. *See Hewlett-Packard*, 330 F. Supp. 2d at 1094; *see also Eastman Kodak*, 2012 WL 4103811, at *8.

Defendants have also failed to show that Dr. Handley received the type of confidential or privileged information the rule protects. Mr. Mellett asserts in conclusory fashion that "Dr. Handley has received numerous confidential communications and voluminous confidential information from Department of Justice attorneys and staff regarding CVAP data," for example. Dkt. 408–5 ¶ 16. This statement does not identify any "specific and unambiguous" privileged information provided to Dr. Handley. *Hewlett-Packard Co.*, 330 F. Supp. 2d at 1094. Rather, his vague reference to CVAP data implies that such information was *not* privileged: in the expert disqualification content, "[c]ommunication based upon technical information as opposed to legal advice is not considered privileged." *Nikkal Industries, Ltd. v. Salton, Inc.*, 689 F. Supp. 187,

[5] *See* Dkt. No. 408-4 at 12–13, 15 n.18, 16–17 (citing only publicly available materials to demonstrate general principles using as examples *United States v. Village of Port Chester*, *United States v. City of Eastpointe*, and *Texas v. United States*, and not even discussing the remaining three DOJ cases cited by Defendants).

191–92 (S.D.N.Y. 1988); *see also Capitol Records, Inc. v. MP3tunes, LLC*, No. 07 CIV. 9931 (WHP), 2010 WL 11590131, at *1 (S.D.N.Y. Apr. 15, 2010) (describing confidential information "in the context of expert disqualification" as including discussions about litigation strategy, and explaining that purely "'technical information is not confidential'" (quoting *Koch*, 85 F.3d at 1182)).

Defendants' contention that they will be unable to fully cross-examine Dr. Handley because doing so would supposedly reveal confidential communications also rings hollow. Dr. Handley's report does not offer any substantive conclusions about the merits of the cases on which she worked with DOJ. She merely cites three of these cases to explain the mechanics of how she went about using existing CVAP data to establish the first *Gingles* precondition for Section 2 VRA liability—*i.e.*, that a minority group was sufficiently large and geographically compact to constitute a majority in a single-member district. Defendants offer no explanation as to how cross-examining Dr. Handley about this data and mapping exercise would somehow require the disclosure of confidential information.[6] Moreover, for other cases Dr. Handley discusses in which she was not retained by DOJ, such as *Lopez v. Abbott*, there can be no argument that cross-examining her about her work in those cases would require disclosure of confidential information. The Court should reject their attempt to use confidentiality as both a shield and a sword to disqualify Dr. Handley.

C. Both the Public Interest and Unfair Prejudice to Plaintiffs Also Provide a Sufficient Basis to Reject Defendants' Motion.

Courts consider not only the public interest of disqualification under the final factor, but also "issues of fundamental fairness, and whether any prejudice might occur if an expert is or is

[6] To the extent Defendants assert that doing so would itself require disclosure of confidential information, they could have identified such information for the court without public disclosure through a declaration of affidavit filed under seal; it is telling that they have failed to identify such information with any sort of specificity.

not disqualified," the latter of which "is especially appropriate at late stages in the litigation, at which time disqualification is more likely to disrupt the judicial proceedings." *Hewlett-Packard*, 330 F. Supp. 2d at 1094–95. Additionally, a court may find that a party waived their right to disqualify an expert by delaying in making their challenge. In *English Feedlot, Inc. v. Norden Laboratories, Inc.*, 833 F. Supp. 1498, 1504 (D. Colo. 1993), for example, the court found waiver in part because the party who had previously retained an expert waited several months after finding their adversary had retained the expert to challenge his testimony. Both the public interest and unfair prejudice to Plaintiffs support denying the motion.

First, allowing Defendants to disqualify an expert who was previously retained by a different branch of the federal government would run contrary to the public interest by allowing the government to disqualify experts at their whim when there is no risk of conflict. That is precisely what Defendants attempt here. Having failed to identify their own VRA expert even from within the division that purportedly needs this enhanced citizenship data, they instead seek to manufacture a false conflict as a litigation tactic.

Second, Defendants contend that "Plaintiffs can easily retain a new expert in the field, one who did not work for a company that is a key witness in this case," and suggest that Plaintiffs could retain other VRA expert witnesses such as Professor Pamela Karlan. Def. Br. at 12 (quoting *In re Namenda*, 2017 WL 3613663, at *8); Docket No. 408–6 (Karlan expert disclosure). Professor Karlan recently served as Deputy Assistant Attorney General for Civil Rights with oversight of the Voting Section,[7] the same role that John Gore served in before he temporarily became Acting AAG for Civil Rights. Defendants' apparent willingness to permit

[7] *See* Stanford Law School, Pamela S. Karlan Biography, *available at* https://law.stanford.edu/directory/pamela-s-karlan/ (noting that Professor Karlan formerly served as "a Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice (where she received the Attorney General's Award for Exceptional Service – the department's highest award for employee performance…)"

Plaintiffs to retain Professor Karlan as an expert witness—who, like Dr. Handley has "work[ed] for a company that is a key witness in this case"—smacks of gamesmanship. Indeed, Defendants know that by waiting until a week before trial to announce their position, they have hamstrung efforts to retain a new expert. Because of this pretrial ambush, Plaintiffs would be prejudiced by losing the opportunity to identify a new expert in the few days remaining before trial. By waiting many weeks to announce their position and seek disqualification, Defendants have waived their right to do so. *See English Feedlot*, 833 F. Supp. at 1504.

While the law does not support exclusion of any aspect of Dr. Handley's testimony, should the Court disagree, it should nonetheless not disqualify Dr. Handley completely. Because her opinions are based on a lifetime of VRA work and are not tied to specific DOJ cases, she could provide the same opinions without discussing the details of analysis on DOJ cases. This would address any possible concerns raised by Defendants. If the Court were to do so, then, consistent with Defendants' position that Plaintiffs "may retain a new expert in the field," it should also grant Plaintiffs leave to identify and retain a new expert witness on the same topics before the close of evidence.

Such a ruling should not prove necessary, however. Defendants seek to impose a rule that does not apply here, given that Dr. Handley has never served as an expert for the Census Bureau or the Commerce Department. And even if she could properly be characterized as having served as a witness for Defendants, they have not identified "specific and unambiguous disclosures" that would harm them; instead, they cite to technical data that lacks privileged status under this test. Nor have they offered anything more than a conclusory assertion that they cannot cross-examine her. Their gamesmanship in springing this motion at the last minute also militates

against disqualification, not to mention the dangerous precedent it would set. The Court should deny the motion outright.

Respectfully submitted,

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ATTACHMENT A1

From: Comstock, Earl (Federal) [redacted]
Sent: 5/2/2017 2:19:11 PM
To: Wilbur Ross [redacted]
CC: Herbst, Ellen (Federal) [redacted]
Subject: Re: Census

I agree Mr Secretary.

On the citizenship question we will get that in place. The broad topics were what were sent to Congress earlier this year as required. It is next March -- in 2018 -- when the final 2020 decennial Census questions are submitted to Congress. We need to work with Justice to get them to request that citizenship be added back as a census question, and we have the court cases to illustrate that DoJ has a legitimate need for the question to be included. I will arrange a meeting with DoJ staff this week to discuss.

Earl

Sent from my iPhone

> On May 2, 2017, at 10:04 AM, Wilbur Ross [redacted] wrote:
>
[redacted]
Worst of all they emphasize that they have settled with congress on the questions to be asked. I am mystified why nothing have been done in response to my months old request that we include the citizenship question. Why not? [redacted]
> Sent from my iPhone

ATTACHMENT A2

September 8, 2017

To: Secretary Wilbur Ross

Fr: Earl Comstock

Re: Census Discussions with DoJ

In early May Eric Branstad put me in touch with Mary Blanche Hankey as the White House liaison in the Department of Justice. Mary Blanche worked for AG Sessions in his Senate office, and came with him to the Department of Justice. We met in person to discuss the citizenship question. She said she would locate someone at the Department who could address the issue. A few days later she directed me to James McHenry in the Department of Justice.

I spoke several times with James McHenry by phone, and after considering the matter further James said that Justice staff did not want to raise the question given the difficulties Justice was encountering in the press at the time (the whole Comey matter). James directed me to Gene Hamilton at the Department of Homeland Security.

Gene and I had several phone calls to discuss the matter, and then Gene relayed that after discussion DHS really felt that it was best handled by the Department of Justice.

At that point the conversation ceased and I asked James Uthmeier, who had by then joined the Department of Commerce Office of General Counsel, to look into the legal issues and how Commerce could add the question to the Census itself.

ATTACHMENT A3-1

To: Herbst, Ellen (Federal [PII]
From: Comstock, Earl (Federal)
Sent: Tue 3/14/2017 12:10:33 PM
Importance: Normal
Subject: Re: 17-053169
Received: Tue 3/14/2017 12:10:35 PM

He had a meeting with Mark Newman on Census in NYC this weekend and has another scheduled for Thursday I believe.

Will ask him about the Census response. Earl

Sent from my iPhone

> On Mar 14, 2017, at 7:59 AM, Herbst, Ellen (Federal) [PII]
>
> I don't know if he got through all the material that was in his weekend book
>
> Sent from my iPhone
>
>> On Mar 14, 2017, at 7:50 AM, "Comstock, Earl (Federal)" <[PII] wrote:
>>
>> Let's discuss. Has the Secretary reviewed the Census Bureau action plan? Thanks. Earl
>>
>> From: "Owens, Derrick (Federal)" [PII]
>> Date: Monday, March 13, 2017 at 6:25 PM
>> To: "Comstock, Earl (Federal)" [PII], "Langdon, David (Federal)" [PII], Carter Hallman [PII]
>> Cc: "Alvord, Dennis (Federal)" [PII]
>> Subject: 17-053169
>>
>> Good evening,
>>
>> Please clear on this assignment by COB on Tuesday.
>>
>> Thank you.
>> <17-053169 Clearance Package.pdf>

To: Comstock, Earl (Federal) [PII]
From: A M Neuman
Sent: Fri 4/14/2017 3:41:31 AM
Importance: Normal
Subject: Re: Census Questiion
Received: Fri 4/14/2017 3:41:47 AM

I believe that the annual notification to Congressional committee relating to questionnaire content additions for 2020 Census just took place. (Which is why there were a few articles about the lack of planned questions relating to sexual orientation).
Let me double-check on that.

There will be another opportunity next year.

I recommend that you ask the Bureau to provide a list of the response rates on ALL demographic questions currently asked on the ACS. You will see whether certain demographic questions have lower response rates than others -- especially among certain demographic groups. That is something that can be provided OFF THE SHELF.

A. Mark Neuman

> On Apr 13, 2017, at 9:58 PM, Comstock, Earl (Federal) <[PII] wrote:
>
> Hi Mark -- quick question. When does Census need to notify Congress regarding the questions that will be on (A) the ACS and (B) the decennial Census?
>
> Thanks. Earl
>
> Sent from my iPhone

To: Comstock, Earl (Federal) **PII**
From: A M Neuman
Sent: Tue 4/11/2017 6:31:13 PM
Importance: Normal
Subject: One of the Supreme Court cases that informs planning for 2020 Census....
Received: Tue 4/11/2017 6:31:20 PM
index.pdf

https://supreme.justia.com/cases/federal/us/548/05-204/index.pdf

A. Mark Neuman

ATTACHMENT A3-2

From: A M Neuman [redacted]
Sent: 4/14/2017 3:41:31 AM
To: Comstock, Earl (Federal) [redacted]
Subject: Re: Census Questiion

I believe that the annual notification to Congressional committee relating to questionnaire content additions for 2020 Census just took place. (Which is why there were a few articles about the lack of planned questions relating to sexual orientation).
Let me double-check on that.

There will be another opportunity next year.

I recommend that you ask the Bureau to provide a list of the response rates on ALL demographic questions currently asked on the ACS. You will see whether certain demographic questions have lower response rates than others -- especially among certain demographic groups. That is something that can be provided OFF THE SHELF.

A. Mark Neuman

> On Apr 13, 2017, at 9:58 PM, Comstock, Earl (Federal) <[redacted] wrote:
>
> Hi Mark -- quick question. When does Census need to notify Congress regarding the questions that will be on (A) the ACS and (B) the decennial Census?
>
> Thanks. Earl
>
> Sent from my iPhone

From: Wilbur Ross [redacted]
Sent: 5/2/2017 2:23:38 PM
To: Teramoto, Wendy (Federal) [redacted]
Subject: Re: Census

Let's try to stick him in there for a few days to fact find. W

Sent from my iPhone

On May 2, 2017, at 7:17 AM, Teramoto, Wendy (Federal) <[redacted]> wrote:
I continue to talk frequently with Marc Neumann and we often have dinner together. He will not leave les but is in love with the census and talks about it non stop. [redacted] Do you want me to set up another meeting? [redacted] Let me know if you want to have a drink or get together with him over the weekend.
Wendy

Sent from my iPhone

Begin forwarded message:
From: "Alexander, Brooke (Federal)" <[redacted]>
Date: May 2, 2017 at 7:10:21 AM PDT
To: "Teramoto, Wendy (Federal)" <[redacted]>
Subject: FW: Census

-----Original Message-----
From: Wilbur Ross [redacted]
Sent: Tuesday, May 02, 2017 10:04 AM
To: Comstock, Earl (Federal) <[redacted]>; Herbst, Ellen (Federal) <[redacted]>
Subject: Census

[redacted] Worst of all they emphasize that they have settled with congress on the questions to be asked. I am mystified why nothing have been done in response to my months old request that we include the citizenship question. Why not? [redacted]

From: [redacted]
Sent: 9/13/2017 8:33:27 PM
To: A M Neuman [redacted]
Subject: Re: Questions re Census

Mark,

Thanks again for the discussion and helpful information.

Regards,
James

On Sep 13, 2017, at 1:21 PM, A M Neuman [redacted] wrote:
Note to James Uthmeier

From: A Mark Neuman

Subject: Census 2020

James -- I appreciate our discussions about the 2020 Census preparations.

[redacted]

On Sep 13, 2017, at 12:19 PM, Uthmeier, James (Federal) [redacted] wrote:

Hey Mark—just following up on this, sorry for not getting back to you sooner. Any chance you are free to chat soon today? Would be much appreciated. My cell is [redacted]

From: Uthmeier, James (Federal)
Sent: Friday, September 08, 2017 8:46 AM
To: [redacted]
Subject: Questions re Census

Hi Mark,

I am working on [redacted] and they asked me to reach out to you about some research that I have been doing. Any chance you might have a few minutes this morning to discuss? I'm available all morning at the number below, or happy to give you a call whenever convenient.

Thank you,
James

James W. Uthmeier
Senior Counsel to the General Counsel
Regulatory Reform Officer
Department of Commerce
[redacted]

From: [redacted]@doc.gov [redacted]@doc.gov]
Sent: 10/8/2017 10:54:41 PM
To: Wilbur Ross [redacted]
Subject: Re: Letter from DoJ.

Will do...wrapping up my call now.

Sent from my iPhone

> On Oct 8, 2017, at 6:51 PM, Wilbur Ross <[redacted] wrote:
>
> Please call me at [redacted] WLR
>
> Sent from my iPad
>
>> On Oct 8, 2017, at 6:47 PM, Davidson, Peter (Federal) <[redacted]doc.gov> wrote:
>>
>> I'm on the phone with Mark Neumann right now...he is giving me a readout of his meeting last week. I can give you an update via phone if you'd like...
>>
>> Sent from my iPhone
>>
>>> On Oct 8, 2017, at 2:56 PM, Wilbur Ross [redacted]wrote:
>>>
>>> What is its status? WLR
>>>
>>> Sent from my iPad

ATTACHMENT A4-1

To: Uthmeier, James (Federal) PII
From: Shambon, Leonard (Federal)
Sent: Fri 9/15/2017 8:37:51 PM
Importance: Normal
Subject: Current version
Received: Fri 9/15/2017 8:37:52 PM
foreigners included in enumeration Aug 21 2017.docx

Leonard M. Shambon

Special Legal Advisor

Office of the Chief Counsel for Economic Affairs

U.S. Department of Commerce

PII

DRAFT

8/21/2017 3:35 PM

I. Chronological History

Here is the history I've been able to compile, from Census instructions and residence rules, for counting foreign citizens residing in the United States in census enumerations for apportionment. The language (quoted from the underlying documents) is in reverse chronological order because the instructions became more explicit over time.

Census Year

2020 (proposed):

3. Foreign Citizens in the U.S.

(a) Citizens of foreign countries living in the U.S. – Counted at the U.S. residence where they live and sleep most of the time.

(b) Citizens of foreign countries living in the U.S. who are members of the diplomatic community – Counted at the embassy, consulate, United Nations' facility, or other residences where diplomats live.

(c) Citizens of foreign countries visiting the U.S. such as on a vacation or business trip – Not counted in the census.

. . ..

10. College Students

. . ..

(e) College students who are foreign citizens living in the U.S. while attending college in the U.S. (living either on-campus or off-campus) – Counted at the on-campus or off-campus U.S. residence where they live and sleep most of the time. If they are living in college/university student housing (such as dormitories or residence halls) on Census Day, they are counted at the college/university student housing.

See Proposed 2020 Census Residence Criteria and Residence Situations – Proposed Criteria and request for comment, 81 Fed. Reg. 42577, 42582-83 (June 30, 2016). Census would know if any comments were submitted in response. In response to a 2015 Federal Register notice asking for comments on the 2010 residence rule, 80 Fed. Reg. 28950 (May 20, 2015), in anticipation of the 2016 notice, Census 262 comments, but only one dealt with foreigners, specifically how to treat foreign students at U.S. boarding schools. Under the residence criteria, such students are ascribed to their parents' homes outside the U.S. and therefore not counted. Census did not directly address the comment in the notice, but rather adhered to its general rule for boarding school students. See 81 Fed. Reg. at 42578, 42579-80.

2010: 5. Visitors on Census day

. . ..

Citizens of foreign countries who are visiting the U.S. on Thursday April 1, 2010 (Census Day), such as on a vacation or a business trip – Not counted in the census

8. Students

. . .

Foreign students living in the U.S. while attending college in the U.S. (living either on-campus or off-campus) – Counted at the on-campus or off-campus residence where they live and sleep most of the time.

. . .

14. Foreign Citizens in the U.S.

Citizens of foreign countries living in the U.S. – Counted at the U.S. residence where they live and sleep most of the time.

Citizens of foreign countries living in the U.S. who are members of the diplomatic community – Counted at the embassy, consulate, United Nations' facility, or other residences where diplomats live.

Citizens of foreign countries visiting the U.S. such as on a vacation or business trip – Not counted in the census.

2000: 13. Foreign Citizens

Citizens of foreign countries who have established a household or are a part of an established household in the U.S. while working or studying, including family members with them – Counted at the household.

Citizens of foreign countries who are living in the U.S. at embassies, ministries, legations, or consulates – Counted at the embassy, etc.

Citizens of foreign countries temporarily traveling or visiting in the U.S. – Not included in the census

1990: 17. Person is a citizen of a foreign country:

a. Who has established a household while working or studying, including family members living with them – This household
b. Temporarily traveiling or visiting in the United States – DO NOT LIST
c. Living on the premises of an Embassy, Ministry, Legation, chancellery, or Consulate – DO NOT LIST

1980: The 1980 census residence rules stipulated, as in the past, that citizens of foreign countries living on the premises of an embassy, legation, chancery, or consulate were not to be

enumerated, but those who were living in housing units elsewhere to be canvassed and included in the census.

1970: **[Haven't found instructions to enumerators or residence rules]**

1960: 33. Citizens of Foreign Countries Temporarily in the United States

a. Do not list citizens of foreign countries temporarily visiting or traveling in the United States or living on the premises on an Embassy, Ministry, Legation, Chancellery, or Consulate.

b. Do enumerate as residents of your ED [Enumeration District] citizens of foreign countries living here who are students or who are employed here (but not living at the Embassy, etc.) even if they do not expect to remain here. Also enumerate the members of their families if they are living with them in this country.

1950: V. Citizens of foreign countries temporarily in the United States:

A. Students and members of their families – Enumerate
B. Persons employed here and members of their families (but not living at an Embassy, etc.) – Enumerate
C. Any other visitors from a foreign country not included in A and B – Do not enumerate
D. Persons living on premises of an Embassy, Ministry, Legation, Chancellory, or Consulate – Do not enumerate

1940: 313. . . .. As a rule, do not enumerate as residents of your district any of the following classes, except as provided in paragraph 314:

. . ..

d. Persons from abroad temporarily visiting or traveling in the United States and foreign persons employed in the diplomatic or consular service of their country (see par. 331). (Enumerate other persons from abroad who are *students in this country* or who are *employed here*, however, even though they do not expect to remain here permanently.)

331 Diplomatic and Consular Employees of Foreign Governments – Do not enumerate citizens of foreign countries employed in the diplomatic or consular service of their country.

1930: 59. Classes not to be enumerated in your district

. . . should be enumerated as of your district.

c. Persons from abroad temporarily visiting or traveling in the United States. (Persons from abroad who are *employed* here should be enumerated, even though they do not expect to remain here permanently.

1920: 63. Citizens abroad at the time of the enumeration –

. . .. This instruction applies only to citizens of the United States and not to aliens who have left this country, as nothing definite can be known as to whether such aliens intend to return. **[By implication, aliens who had not left the country were to be enumerated.]**[1]

[1] This exclusion for transitory foreign travelers in the U.S. including transitory businessmen has its genesis as far

1910: With minor wording difference, same as for 1920

Before 1910: No instructions found re. enumeration of citizens of foreign countries.

II. Court Finding

In the district court opinion in Federation for American Immigration Reform (FAIR) v. Klutznick, 486 F. Supp. 564 (D.C.D.C. 1980), dismissing the suit on standing ground, the three judge panel wrote:

> The population base used for apportionment purposes consists of a straightforward head count, as accurate as is reasonably possible, of all persons residing within a state on April 1. This has been the practice since the first census in 1790; everyone is counted except foreign diplomatic personnel living on embassy grounds (which is considered "foreign soil," and thus not within any state) and foreign tourists, who do not "reside" here. 486 F. Supp. at 567, 576. [See also Ridge v. Verity, 715 F.Supp. 1308 (W.D. Pa. 1989).]

back as 1849. See Sen. Miscellan. No. 64, 30th Cong., 2d Sess. 24 (Jan. 20, 1849 correspondence from Jesse Chickering to Senator John Davis, primary Senate author of the 1850 census legislation). Chickering also likely was the source of the place of birth questions included statutory schedule for that census. See id. 24-27.

ATTACHMENT A4-2

From: Comstock, Earl (Federal) [redacted]@doc.gov]
Sent: 8/16/2017 8:44:41 PM
To: Teramoto, Wendy (Federal) [redacted]@doc.gov]
CC: Wilbur Ross [redacted]
Subject: Re: Memo on Census Question

Thanks Wendy. That works for me. Earl

From: Wendy Teramoto <[redacted]@doc.gov>
Date: Wednesday, August 16, 2017 at 4:24 PM
To: "Comstock, Earl (Federal)" <[redacted]@doc.gov>
Cc: Wilbur Ross <[redacted]
Subject: Re: Memo on Census Question

Peter Davidson and Karen Dunn Kelly wi both be here Monday. Let's spend 15 min together and sort this out. W

Sent from my iPhone

On Aug 11, 2017, at 4:12 PM, Comstock, Earl (Federal) <[redacted]@doc.gov> wrote:

Mr. Secretary –

Per your request, here is a draft memo on the citizenship question that James Uthmeier in the Office of General Counsel prepared and I reviewed. Once you have a chance to review we should discuss so that we can refine the memo to better address any issues.

Before making any decisions about proceeding I would also like to bring in Peter Davidson and Census counsel to ensure we have a comprehensive analysis of all angles.

Thanks. Earl

<Census Memo Draft2 Aug 11 2017.docx>

To: Uthmeier, James (Federal)[redacted]
From: Shambon, Leonard (Federal)
Sent: Fri 8/11/2017 6:56:17 PM
Importance: Normal
Subject: RE: Census paper
Received: Fri 8/11/2017 6:56:19 PM

Got it and will shoot you the timeline. Updating it now.

Leonard M. Shambon

Special Legal Advisor

Office of the Chief Counsel for Economic Affairs

U.S. Department of Commerce

[redacted]

From: Uthmeier, James (Federal)
Sent: Friday, August 11, 2017 1:59 PM
To: Shambon, Leonard (Federal) [redacted]
Subject: Fwd: Census paper

Hey Lenny,

I just wanted to shoot you a current copy of the census paper. Earl is currently reviewing, [redacted]

[redacted]

Thank you and happy Friday!

James

Begin forwarded message:

> **From:** "Uthmeier, James (Federal)" [redacted]
> **Date:** August 11, 2017 at 10:18:56 AM EDT
> **To:** "Comstock, Earl (Federal)" [redacted]
> **Subject: Re: Census paper**
>
> Made a couple small edits for clarity. [redacted]

To: Shambon, Leonard (Federal)[redacted]
From: [redacted]
Sent: Mon 8/14/2017 3:12:43 PM
Importance: Normal
Subject: Re: Census paper
Received: Mon 8/14/2017 3:12:45 PM

Thanks Lenny.

On Aug 14, 2017, at 11:04 AM, Shambon, Leonard (Federal) <[redacted]> wrote:

Had some small edits to the last draft which I'll incorporate into the current draft.

Leonard M. Shambon

Special Legal Advisor

Office of the Chief Counsel for Economic Affairs

U.S. Department of Commerce

[redacted]

From: Uthmeier, James (Federal)
Sent: Monday, August 14, 2017 9:51 AM
To: Shambon, Leonard (Federal) <[redacted]
Subject: FW: Census paper

Updated version.

To: Comstock, Earl (Federal)[redacted]
From: Uthmeier, James (Federal)
Sent: Fri 8/11/2017 8:05:48 PM
Importance: Normal
Subject: Re: Census paper
Received: Fri 8/11/2017 8:05:51 PM
Census Memo Draft Aug 11 2017.docx

Thanks Earl, clean copy attached. I can swing a call any time after 4:30 today.

James

From: Comstock, Earl (Federal)
Sent: Friday, August 11, 2017 3:40 PM
To: Uthmeier, James (Federal)
Subject: Re: Census paper

Thanks James. Please take a look at the attached edits. If you agree [redacted] Earl

---

From:"Uthmeier, James (Federal)" <[redacted]
Date: Friday, August 11, 2017 at 10:18 AM
To:"Comstock, Earl (Federal)" <[redacted]
Subject: Re: Census paper

Made a couple small edits for clarity. [redacted]

From: Uthmeier, James (Federal)
Sent: Friday, August 11, 2017 9:55:52 AM
To: Comstock, Earl (Federal)
Subject: Re: Census paper

Earl-

A draft, predecisional and privileged memo is attached. [redacted]

I will keep working to clean it up and am happy to incorporate any edits. I am out of the office [redacted] but can be reached on my cell. I'll be able to talk today other than 11-1. Will be working over the next hour to clean this up a bit.

If you want to provide some handwritten comments, you can deliver to Barb (OGC secretary) and she will get them to me quickly.

[redacted]

Best,

James

From: Comstock, Earl (Federal)
Sent: Friday, August 11, 2017 8:11:41 AM
To: Uthmeier, James (Federal)
Subject: Re: Census paper

Great. Thanks! Earl

Sent from my iPhone

> On Aug 11, 2017, at 7:45 AM, Uthmeier, James (Federal) [redacted] wrote:
>
> Earl-
>
> Finishing this up this morning and will have a memo to you by 930.
>
> James
>
> Sent from my iPhone

ATTACHMENT A5-1

To: Uthmeier, James (Federal) [PII]
From: Zadrozny, John A. EOP/WHO
Sent: Wed 1/31/2018 12:48:02 PM
Importance: Normal
Subject: RE: Hill/DOJ pushing for citizenship question on census forms: report
Received: Wed 1/31/2018 12:48:27 PM

James:

Apologies for missing your e-mail. I am literally just seeing this.

I can talk today (Wednesday 1/31) or Friday 2/2, if you can. Tomorrow is a mess. Best window today (for the moment) is 11:00 a.m.-2:00 p.m.

Also, if you don't mind, I'd like to rope my new DPC colleague, Theo Wold, into our call (and our mutual subjects). Theo is handling most of Zina's old portfolio. He literally just started last week.

JZ

w: PII

c:

From: Uthmeier, James (Federal) [mailto: PII]
Sent: Friday, January 26, 2018 8:53 AM
To: Zadrozny, John A. EOP/WHO [PII]
Subject: Re: Hill/DOJ pushing for citizenship question on census forms: report

John,

Monday I'm open 1230-2 and after 4. Any chance you're also open for a brief call today? Let me know.

Thanks,

James

Sent from my iPhone

On Jan 26, 2018, at 7:07 AM, Zadrozny, John A. EOP/WHO [PII] wrote:

> James:
>
> I hope all is well.
>
> Any chance we can chat census on Monday (1/29)? Let me know when works for you.
>
> JZ
>
> w: [PII]
> c:

From: Uthmeier, James (Federal) [mailto: PII
Sent: Sunday, December 31, 2017 5:30 PM
To: Zadrozny, John A. EOP/WHO PII
Subject: Re: Hill/DOJ pushing for citizenship question on census forms: report

The DOJ letter was not released by any political at DOC, so I assume it was leaked.

Yes, we have connected with DOJ and plan to discuss with them as soon as possible.

Happy New Year,

James

On Dec 31, 2017, at 1:46 PM, Zadrozny, John A. EOP/WHO PII wrote:

> Works for me.
>
> Also, have you connected with DOJ yet on this? I talked to them on Wednesday 12/20 about this, and they sounded like they are anticipating this being a point of discussion in the New Year.
>
> Question: Was the DOJ letter released by politicals, or was it leaked?
>
> JZ
>
> w: PII

c: PII

From: Uthmeier, James (Federal) [mailto: PII
Sent: Sunday, December 31, 2017 11:36 AM
To: Zadrozny, John A. EOP/WHO PII
Subject: Re: Hill/DOJ pushing for citizenship question on census forms: report

Yep - propublica broke the story late Friday. They incorrectly cited that the question had not been asked since the 1800s, which we had them correct. This will likely get attention and follow-up questions early next week, so let's plan to get together for a discussion on Tuesday.

From: Zadrozny, John A. EOP/WHO PII
Sent: Sunday, December 31, 2017 10:23:43 AM
To: Uthmeier, James (Federal)
Subject: FW: Hill/DOJ pushing for citizenship question on census forms: report

FYI.

John A. Zadrozny

Special Assistant to the President

Justice and Homeland Security

Domestic Policy Council

Executive Office of the President

w:

PII

c: (

From: Watts, Brad (Judiciary-Rep) [PII
Sent: Sunday, December 31, 2017 10:21 AM
To: Watts, Brad (Judiciary-Rep) PII
Subject: Hill/DOJ pushing for citizenship question on census forms: report

DOJ pushing for citizenship question on census forms: report

BY JULIA MANCHESTER - 12/29/17 09:24 PM EST 794

2,243

The Department of Justice (DOJ) is asking the Census Bureau if a question on citizenship status could be added to 2020 census forms, according to a letter first reported by ProPublica on Friday.

The DOJ letter, dated Dec. 12, said including a question on citizenship would allow the the department to better enforce the Voting Rights Act.

"To fully enforce those requirements, the Department needs a reliable calculation of the citizen voting-age population in localities where voting rights violations are alleged or suspected," the letter said.

However, critics say including a question on immigration could prevent immigrants from participating in the census due to fears the government could use the information against them.

The letter was drafted by Arthur Gary, a lawyer at the DOJ, to Census Bureau official Dr. Ron Jarmin.

A spokesperson for the Census Bureau confirmed the letter to ProPublica, saying the "request will go through the well-established process that any potential question would go through."

The Hill has reached out to the Justice Department for comment.

The letter comes after reports in recent months that the Trump administration plans to include an immigration-related question in the census.

>>>http://thehill.com/homenews/administration/366849-doj-pushing-for-citizenship-question-on-census-forms-report<<<;;

ATTACHMENT A5-2

To: hilary geary[redacted]
From: Alexander, Brooke (Federal)
Sent: Wed 4/5/2017 4:24:19 PM
Importance: Normal
Subject: tonight
Received: Wed 4/5/2017 4:24:00 PM

Mrs. Ross,

Do you have plans following the Newseum? I'm asking because Steve Bannon has asked that the Secretary talk to someone about the Census and around 7-7:30 pm is the available time. He could do it from the car on the way to a dinner …

Brooke V Alexander

Executive Assistant to the Secretary

The U.S. Department of Commerce

Washington, D.C. 20230

balexander@doc.gov

202-482-[redacted] office

[redacted] cell

From: Kris Kobach [mailto[redacted]
Sent: Monday, July 24, 2017 2:43 PM
To: Teramoto, Wendy (Federal) <[redacted]
Cc: Alexander, Brooke (Federal) <[redacted]; Hernandez, Israel (Federal) <[redacted]
Subject: Re: Follow up on our phone call

Yes.

Sent from my iPhone

On Jul 24, 2017, at 1:39 PM, Teramoto, Wendy (Federal) <[redacted]> wrote:

> Kris- can you do a call with the Secretary and Izzy tomorrow at 11 am? Thanks. Wendy
>
> **From:**Kris Kobach [mailto:[redacted]
> **Sent:** Monday, July 24, 2017 12:02 PM
> **To:** Teramoto, Wendy (Federal) <[redacted]
> **Subject:** Re: Follow up on our phone call
>
> That works for me. What number should I call? Or would you like to call me?
>
> On Mon, Jul 24, 2017 at 9:12 AM, Teramoto, Wendy (Federal) <[redacted]> wrote:
>
> We can speak today at 230. Please let me know if that works. W
>
> Sent from my iPhone
>
> On Jul 21, 2017, at 4:34 PM, Kris Kobach <[redacted]> wrote:
>
> Wendy,
>
> Nice meeting you on the phone this afternoon. Below is the email that I sent to Secretary Ross. He and I had spoken briefly on the phone about this issue, at the direction of Steve Bannon, a few months earlier.
>
> Let me know what time would work for you on Monday, if you would like to schedule a short call. The issue is pretty straightforward, and the text of the question to be added is in the email below.

Thanks.

Kris Kobach

[redacted]

---------- Forwarded message ----------
From: **Kris Kobach** <[redacted]>
Date: Fri, Jul 14, 2017 at 9:12 AM
Subject: Follow up on our phone call
To: [redacted]

Secretary Ross,

Kansas Secretary of State Kris Kobach here. I'm following up on our telephone discussion from a few months ago. As you may recall, we talked about the fact that the US census does not currently ask respondents their citizenship. This lack of information impairs the federal government's ability to do a number of things accurately. It also leads to the problem that aliens who do not actually "reside" in the United States are still counted for congressional apportionment purposes.

It is essential that one simple question be added to the upcoming 2020 census. That question already appears on the American Community Survey that is conducted by the Census Burear (question #8). A slight variation of that question needs to be added to the census. It should read as follows:

Is this person a citizen of the United States?

□Yes, born in the United States

□Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas

□Yes, born abroad of U.S. citizen parent or parents

□Yes, U.S. citizen by naturalization – Print year of naturalization _____

□No, not a U.S. citizen – this person is a lawful permanent resident (green card holder)

□No, not a U.S. citizen – this person citizen of another country who is not a green card holder (for example holds a temporary visa or falls into another category of non-citizens)

Please let me know if there is any assistance that I can provide to accomplish the addition of this question. You may reach me at this email address or on my cell phone at [redacted]

Yours,

Kris Kobach

ATTACHMENT A6

From: zzz.External.SBrannon@aclu.org
Sent: Tuesday, October 30, 2018 10:46 PM
To: Bailey, Kate (CIV); Goldstein, Elena; Ehrlich, Stephen (CIV)
Cc: Freedman, John A.; zzz.External.DHo@aclu.org; Gersch, David P.; Colangelo, Matthew; Coyle, Garrett (CIV); Federighi, Carol (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Wells, Carlotta (CIV)
Subject: Re: New York, et al. v. U.S. Dep't of Commerce, et al., 18-cv-2921 (JMF) -

Kate,

First, you had previously indicated that you would be getting back to us today about the government's position on the list of stipulations that we sent last week. Can you please let us know the status of that.

Second, we wanted to let you know that we are working on a supplement to the exhibit list mostly for the purpose of including materials we received in recent discovery. We are planning to get you that supplement by mid-day tomorrow.

Third, we have identify in the recent productions a number of documents that we believe should be part of the Administrative Record, and we want to know if the government is willing to agree to change their designations to acknowledge this. Those documents are listed here:

COM_DIS prefix

14335 14338 15698 15678 15704 15707 15711 16106 16118
16561 16562 16563 16564 16571 16575 16577 17047 17126 17127 17396 17398 17402
17405 17407 17409 17468 17490 17499 17501 17554 17585 17618 17620 18195 18199 1
8202 18535 18543 18546 18588 18592 18614 18615 18772 18873 18875 19464 19468
19687 19691 19987 20024 20028 20031 20058 20062 20557 20561 20862 20864

Finally, sorry to not get back to you sooner, but we do intend to ask for the opportunity to present opening statements; and propose asking the Court for 10 minutes for NYAG, 10 minutes for NYIC and 10 minutes for DOJ. Please let us know if this proposal is acceptable.

thanks
Sarah

From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>
Sent: Tuesday, October 30, 2018 9:44 PM
To: Goldstein, Elena; Sarah Brannon; Ehrlich, Stephen (CIV)
Cc: Freedman, John A.; Dale Ho; Gersch, David P.; Colangelo, Matthew; Coyle, Garrett (CIV); Federighi, Carol (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Wells, Carlotta (CIV)
Subject: RE: New York, et al. v. U.S. Dep't of Commerce, et al., 18-cv-2921 (JMF) - Park Su designations

Counsel,

Please find attached additional counterdesignations and objections. I will send you Jarmin's transcript shortly.

Kate Bailey
Trial Attorney
United States Department of Justice
Civil Division – Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20005
202.514.9239 | kate.bailey@usdoj.gov

From: Goldstein, Elena [mailto:Elena.Goldstein@ag.ny.gov]
Sent: Tuesday, October 30, 2018 2:59 PM
To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Sarah Brannon <sbrannon@aclu.org>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>
Cc: Freedman, John A. <John.Freedman@arnoldporter.com>; Dale Ho <dho@aclu.org>; Gersch, David P. <david.gersch@arnoldporter.com>; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Halainen, Daniel J. (CIV) <dhalaine@CIV.USDOJ.GOV>; Tomlinson, Martin M. (CIV) <mtomlins@CIV.USDOJ.GOV>; Wells, Carlotta (CIV) <CWells@CIV.USDOJ.GOV>
Subject: New York, et al. v. U.S. Dep't of Commerce, et al., 18-cv-2921 (JMF) - Park Su designations

Counsel,
Attached please find Plaintiffs' deposition designations for Park Su, and highlighted transcripts. We will produce these on a rolling basis; we just received the transcripts for Mr. Neuman and Mr. Langdon today; we will be providing you designations on these as soon as we are able.

Elena Goldstein | Senior Trial Counsel
Civil Rights Bureau
New York State Office of the Attorney General
28 Liberty Street, 20th Floor | New York, New York 10005
Tel: (212) 416-6201 | Fax: (212) 416-6030 | elena.goldstein@ag.ny.gov | www.ag.ny.gov

ATTACHMENT A7

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, NEW YORK IMMIGRATION COALITION, et al., Consolidated Plaintiffs v. UNITED STATES DEPARTMENT OF COMMERCE, et al., Defendants.	Civil Action No. 1:18-cv-2921-JMF

DECLARATION OF DR. LISA HANDLEY

1. Plaintiffs in this case have asked me to provide my expert opinion on the effectiveness of current U.S. Census Bureau data resources for enforcing Section 2 of the Voting Rights Act ("VRA") – in particular, in circumstances in which the citizenship rate of the minority group impacts their ability to participate in the electoral process and elect candidates of their choice to office.

2. I understand that the Defendants in this case recently filed a motion seeking to disqualify me from testifying on the grounds that any testimony I provide at trial would necessarily require divulging confidential communications with the U.S. Department of Justice ("DOJ"), for whom I have worked as an expert. But this is not the case. I am fully prepared to testify at trial about my expert opinions without divulging confidential communications with any of my clients, including DOJ.

3. In drafting my expert report and forming the conclusions that are the basis for it, I relied on publicly available expert reports that have been previously disclosed. My conclusions relate to general principles of VRA enforcement and any cases that I referenced served merely as examples.

4. In my report, I offered the opinion based solely on my decades of experience as a voting rights expert and publicly available documents that my work has not been hampered in any way by the lack of citizenship data collected through the "full count" of the population during the decennial census. Such "full count" citizenship data has never been available from the Census Bureau for purposes of VRA enforcement; rather, I have always relied on statistical estimates of citizenship derived from sample surveys, such as the Census "long form" (through the 2000 census) and, more recently, the ACS.

5. To explain my opinion and demonstrate how Census Bureau survey data regarding citizenship is currently used in the context of voting rights cases and analyses, I provided several examples from my work in my expert report. For some of these cases I discussed, I was retained by parties other than the Department of Justice ("DOJ"), such as in *Lopez v. Abbott*. For others, I was retained by DOJ and testified on behalf of the plaintiffs. For both categories of cases, I discussed the general analysis and methodology I routinely use in my work as a voting rights expert to explain the adequacy of the current data and how the lack of citizenship data at the block level has not impeded my analysis. I did not share or rely on any confidential information from any cases in which I have been retained in forming my opinions.

6. In my more than 30 years of experience as a voting rights and redistricting expert, I have advised scores of jurisdictions and other clients on minority voting rights and redistricting-related issues and have served as an expert in dozens of voting rights cases. My clients have

included state and local jurisdictions, national civil rights organizations, such international organizations as the United Nations, and DOJ. In more than 25 voting rights cases, I have served as an expert witness, including in six cases on behalf of DOJ. During the course of these representations, I have never divulged confidential information without my client's explicit permission, and did not do so here. The confidentiality agreements I signed with DOJ allowed me to reference publicly available materials related to those cases, which is exactly what I did in this case without making any unauthorized disclosures or violating the terms of those agreements.

7. The opinions and conclusions asserted in my expert report are mine alone. The information cited in my report about prior cases is publicly available, and I did not need to use (and did not use) any confidential information obtained from DOJ or other sources as the basis for my opinions.

8. I am prepared to answer questions at trial about my expert report, my previous work, and any other relevant topic, and would do so without divulging any confidential communications with any of my clients, including the Department of Justice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: October 31, 2018
Washington, DC

Lisa Handley

Lisa Handley